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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1937

PEOPLE OF THE STATE OF ILLINOIS

v.

JAMES BRANDYS and GERALD DeMORROW,

Petitioner

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT FOR
THE FOURTH JUDICIAL CIRCUIT OF
THE STATE OF ILLINOIS

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The petitioner, JAMES BRANDYS, prays that a writ of certiorari issue to review the order of the Appellate Court for the Fourth Judicial District of the State of Illinois affirming judgement on the verdict of guilty in the Circuit Court of Vermilion County, Illinois; the Illinois Supreme Court denied petitioner leave to appeal the judgement of the Appellate Court.

OPINIONS BELOW

The only opinion by the Circuit Court was the Order Denying Defendants' Motions To Suppress And Exclude Evidence; this opinion, not reported, is set forth in Appendix A to this petition. The opinion of the Appellate Court for the Fourth Judicial District of the State of Illinois is reported at 15 Ill. App. 3d, 304 N.E. 2d 471 (set forth in Appendix B of this Petition.) The notification of denial by the Supreme Court of the State of Illinois of the petition for leave to appeal and that Court's mandate are set forth in Appendix B hereto (pp. 14–16).

JURISDICTION

The judgement of the Appellate Court For the Fourth Judicial Circuit of the State of Illinois was entered on November 29, 1973. The Supreme Court of the State of Illinois denied the petition for leave to appeal from Appellate Court Fourth District on March 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the Constitutional right of the people against unreasonable searches and seizures, as enunciated in **Coolidge v. New Hampshire**, 403 U.S. 443 was violated when petitioner's car was well identified as that used in a crime, with ample time to secure a search warrant, yet a warrantless seizure followed and evidence obtained therein was heavily relied upon at trial.

2. And whether alleged consent to the seizure was voluntary, by petitioner's pregnant wife under emotional stress and pressure and unlikely circumstances.

CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

– Constitution of the United States, Amendment IV.

STATEMENT OF MATERIAL FACTS OF THE CASE

On August 1, 1971 the victim was abducted by the petitioner James Brandys and Gerald DeMorrow outside her home at Hoopeston, Illinois. She was driven into the countryside and sexually assaulted by them. A girlfriend witnessed the abduction. The victim was left and some time thereafter petitioner's car was stopped by police in a nearby town. A large damp spot was noticed in the middle of the back seat but nothing further and the defendants were permitted to proceed after a negative stolen car check.

On August 4, 1971 an officer of the Hoopeston, Illinois police department and a Michigan State Trooper went to the petitioner's home in Three Oaks, Michigan accompanied by the victim and the witness.

The police had, at that time, reason to believe the petitioner's car was used in the crime and they wanted to see if the victim and witness could identify the car. The victim and witness did identify the car as that used in the crime. The identification was made from the road outside the home.

The officers, then went to the house and were told that Mr. Brandys wasn't home by his wife. Thereupon they went to the car, which was parked and unoccupied at the rear door of the home and looking in noted two large spots on the rear seat and also that the front seats had been changed from bench seats to bucket seats from the time the car was observed in Milford, Illinois. The police contended they did not open the car doors to make the observation; witnesses for petitioner stated that they did. The police then left and returned to the State Police station.

One half to one hour later these police officers stopped the Brandys car on a highway. They stated that they were returning

to the Brandys home to see if petitioner was there.

The car was stopped on the pretext of looking for beer. It was driven by a neighbor of the Brandys' and Mrs. Brandys was being driven to her mother's house. The police claimed Mrs. Brandys was given a choice as to the surrender of the car, and consented; Mrs. Brandys stated and the neighbor indicated that she was not given a choice. At the time she was crying, five months pregnant, had learned her husband was being sought by the police and attempting to reach her mother's home.

The next day and for the first time a search warrant was obtained and thereafter photographs of the car taken and hair seized. The photographs were used at trial to identify the car seen at Milford, Illinois and later at Three Oaks, Michigan and the hair samples were submitted into evidence.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED UPON:

The Illinois Circuit Court. The federal questions sought to be reviewed here were raised in the court of first instance by petitioner's timely motion to suppress evidence made before trial for the reason that law officers went to petitioner's home where his car was parked on the premises and without arrest or search warrant or any lawful authority made a search and interior observation thereof and left; that thereafter petitioner's wife was being driven to her mother's, when on a public highway the law enforcement officers stopped the car and without lawful authority seized it; that the search and seizure were in violation of the United States Constitution. The trial court issued its order denying defendants' (consolidated) motions to suppress and exclude evidence (Appendix A pp. 1 to 13); the Court considered and discussed the constitutionality of the first search, the seizure and the voluntariness of the "consent" in its order (App. A pp. 10 to 13).

The Illinois Appellate Court. Petitioner's brief to the Appellate Court contended, among other things, that the police had opportunity and probable cause to secure a search warrant before exigent circumstances existed i.e. the car on the road and the failure to do so was a violation of petitioner's constitutional rights under the Fourth Amendment particularly under the teachings of **Coolidge (Coolidge v. New Hampshire** 403 U.S. 443, 91 S. Ct. 2022). The Appellate Court, however, viewed **Coolidge** as distinguishable as the police knew the exact location of the automobile and planned all along to seize it, but viewed the facts of the case at bar that the authorities were engaged in a routine investigation, that petitioner's car had positively been identified as the vehicle and the police went to his home to question him and made their observations while the car was in plain view. Further, that when the police seized the car it was mobile and travelling on a public highway and exigent circumstances existed. That Court also accepted the trial court's finding of voluntary consent. Accordingly the judgement of the Circuit Court was affirmed. (App. B p. 11).

The Illinois Supreme Court: Petitioner's petition for leave to appeal from the Appellate Court reiterated that probable cause and opportunity to secure a search warrant, as mandated by the Constitution's Fourth Amendment and **Coolidge**, existed before police went on the Petitioner's premises and both increased respectively as they viewed the interior of the car observing additional incriminating evidence and then left for one-half hour to one hour to be later presented with "exigent circumstances" when they saw the car on the public highway. The petition for leave to appeal was denied on March 28, 1974 (App. B pp. 15 to 16).

REASONS FOR GRANTING THE WRIT

The court below has decided a federal question of substance

in a way not in accord with the applicable decision of this Court in **Coolidge v. New Hampshire** (403 U.S. 443). The Appellate Court held that the facts of **Coolidge** are distinguishable as there the police knew the exact location of the car and planned to seize it (App. B p. 7). Yet **Coolidge** held in pertinent part that even if there is probable cause for the seizure or search of an automobile, a search of the automobile without a valid warrant is unconstitutional unless there are exigent circumstances making it impracticable to obtain a warrant; the opportunity for search is not so fleeting as to furnish such exigent circumstances where (1) the police had known for some time the role of the automobile, (2) the accused was aware that he was a suspect, but had been cooperative and there was no indication that he meant to flee, (3) he had already had ample opportunity to destroy any evidence he thought incriminating, (4) the automobile was regularly parked in the driveway of his house and was not being used for any illegal purpose when it was seized, (5) the objects searched for were neither stolen nor contraband nor dangerous, (6) there was no way the accused could conceivably have gained access to the automobile after the police arrived on his property. In the case at bar the car was parked in the driveway, ample time to destroy evidence had elapsed i.e. from August 1 to August 4, 1971, nothing in the car was stolen, contraband nor dangerous, the two officers were at the car depriving opportunity to flee and the car was unoccupied. The car had been seen earlier at Milford, Illinois and the victim and the witness to the abduction identified it from the road outside the petitioner's home so that probable cause existed, as did ample opportunity to obtain a search warrant. In short no applicable distinction between the cases is seen.

The Appellate Court found the seizure on the highway was justifiable as exigent circumstances then existed. (App. B p. 10). But the automobile was on the highway only because the police had failed to make a warranted seizure prior to that time, including the period when they had left the Brandys home, re-

turning to the State Police Station and then starting to return to the Brandys residence.

In addition the state appeals court found with the circuit court that the consent of Mrs. Brandys was voluntary (App. B p. 9), even though at the time Mrs. Brandys was five months pregnant, crying, had learned her husband was being sought by the police and wanted to get to her mother's house and further denied giving consent, nor did the neighbor hear her do so. The appellate court relied upon **Schneckloth v. Bustamonte** (U.S. , 93 S. Ct. 2041, 36 L. Ed. 2d 854 emphasizing the language that "Voluntariness is a question of fact to be determined from all the circumstances...". (App. B p. 9) But this Court also stated in **Schneckloth**,

> "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercieve police questions, **as well as the possibly vulnerable state of the person who consents**" (emp. added).

Following the seizure, photographs were taken and hair sweepings. The photographs were used at trial to identify the car by the victim, the abduction witness and by other prosecution witnesses. The hair samples were also admitted into evidence. Stated this Court in **Coolidge**,

> "Since evidence obtained in the course of the search was admitted at Coolidge's trial, the judgement must be reversed..."

It is submitted that where erroneous and artificial reasoning of state courts circumvent the decisions of this Court, the result is the same as if the constitutional protection claimed does not exist; accordingly it is submitted that the decision of this Court in **Coolidge** should be enforced.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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and Counsel of Record

APPENDIX A

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
VERMILION COUNTY, DANVILLE, ILLINOIS

THE PEOPLE OF THE
STATE OF ILLINOIS)
vs) NO. 71-CF-155
JAMES BRANDYS AND)
GERALD DEMORROW)

ORDER DENYING DEFENDANTS'
MOTIONS TO SUPPRESS AND EXCLUDE EVIDENCE

The defendant James Allen Brandys filed a motion to suppress certain evidence obtained by police authorities as a result of a search of his 1964 Chevrolet automobile.

The defendant Gerald DeMorrow filed a motion to suppress certain evidence obtained by the police authorities as a result of the search of defendant Brandys' automobile and also to exclude from evidence certain items of clothing taken from defendant DeMorrow's home at the time of his arrest.

By agreement of the parties the motions were combined for a hearing and the court finds from the evidence introduced at the hearing that the facts were as follows:

On August 1, 1971, a twelve year old girl, Cindy Jean Drollinger, of Hoopeston, Illinois was allegedly abducted and raped in the back seat of an automobile by two men in Vermilion County, Illinois. Officer Thomas Mannin of the Hoopeston, Illinois Police Department investigated the incident and during the course of the investigation received information that the automobile of the defendant Brandys may have been the vehicle used in the commission of the alleged offenses.

On the morning of August 4, 1971, Officer Mannin drove Cindy Jean Drollinger, Jackie Morris, another twelve year old girl who was with Cindy Drollinger at the time of the alleged incident but who escaped from the alleged abductors, and the fathers of Cindy and Jackie in his personal car to the home of defendant Brandys on a rural route in Three Oaks, Michigan. Trooper Den Houten of the Michigan State Police accompanied Officer Mannin in his State Police car.

The defendant Brandys' automobile was parked near his house and upon arrival Officer Mannin asked Cindy Drollinger and Jackie Morris if they could identify the defendant's automobile as the one used in the Illinois incident. Both girls identified the defendant's automobile as the one used in the commission of the alleged criminal offenses.

Trooper Den Houten, who was in uniform, went to the front door of the defendant Brandy's residence and the defendant's wife, Betty Brandys, answered the door. Trooper Den Houten asked if the defendant was home and Mrs. Brandys said that he was not. In her testimony at the hearing, Mrs. Brandys admitted that her husband was home when she told Trooper Den Houton that he was not. Mrs. Brandys testified that while she was talking to Trooper Den Houton about where her husband might be, Officer Mannin went up to her husband's automobile and opened a back door, looked around and then walked around and opened the front door on the driver's side and looked around inside the car. Andrew Brandys, the father of the defendant, in rebuttal testified that he was present and saw Officer Mannin open the front door on the passenger's side and get down and look under the front seat and look into the back seat.

Although both Mrs. Brandys and Andrew Brandys were present, their testimony is conflicting. Mrs. Brandys testified that Officer Mannin opened two while Andrew Brandys testified

that the officer opened only one door and he further said the bucket seats had always been in the car.

Mrs. Brandys testified that the front door opened by the officer was on the driver's side, while Mr. Brandys testified it was on the passenger's side.

Both police officers and James Drollinger, the father of Cindy Drollinger, who observed the actions of the officers while they were at the Brandys residence, testified that the doors of the automobile were never opened during the time the officers were at the residence and that the officers looked in the car only through the windows while standing beside the car.

Both officers testified that while they were looking in the rear window of the Brandys automobile, they observed two large spots on the rear seat. One officer said they were three, four or five inches across and the other said they were as large as a fist.

Considering the testimony of Mrs. Brandys and Andrew Brandys as compared to the testimony of both police officers and Mr. Drollinger and considering the demeanor of the witnesses, the court finds the testimony of the latter witnesses to be more credible and specifically finds for the purpose of these motions, that the police officers did not open the doors of the defendant Brandys' automobile or enter the automobile during the time they were present at the Brandys' residence.

Officer Mannin testified that he told Mrs. Brandys of the incident in Illinois; that they suspected her husband might be involved and that they wanted to talk to him about it.

Mrs. Brandys testified that Officer Mannin asked her how long the bucket seats had been in the automobile and that she said she didn't know. Officer Mannin later testified that he asked the question because his investigation indicated that at

the time of the Illinois incident the automobile used had "straight" front seats.

Officer Mannin and his passengers and Trooper Den Houten left the Brandys residence in their respective automobiles and drove to the Michigan State Police Post. Trooper Den Houten testified that he had been on the case for only an hour and thought he and Officer Mannin should discuss the case at the Post and decide how to proceed. Approximately thirty minutes after leaving the Brandys residence, Officers Mannin and Den Houten were enroute back to the Brandys residence for the purpose of ascertaining whether the defendant had arrived home and to ask about the possible impoundment of the automobile, when they encountered the Brandys automobile on a public highway going in the opposite direction. Recognizing Mrs. Brandys and thinking the male driver was the defendant Brandys, whom neither officer had ever met, Trooper Den Houten made a "U" turn in his squad car and stopped the Brandys automobile.

Trooper Den Houten asked to see the driver's license of the driver, who turned out to be one Gerald Koth, a neighbor of the Brandys'. Mrs. Brandys testified that she had called Mr. Koth after the officers left her residence and asked him to drive her to her mother's home in New Buffalo, Michigan.

After being asked for his driver's license, Mr. Koth got out of the automobile and walked toward the rear of the left side of the automobile where he talked to Officer Mannin. Trooper Den Houten meanwhile walked around to the passenger's side of the automobile where Mrs. Brandys had opened the right front door. Mrs. Brandys testified that Trooper Den Houten looked into the car and said he was looking for beer. She testified further that Trooper Den Houten said he wanted to take the automobile to the State Police Post for a search and she asked him if she had a choice and that Trooper Den Houten said "no".

The driver Koth testified that the only part of the conversation that he heard between Mrs. Brandys and Trooper Den Houten was a question by Mrs. Brandys as to whether she had a choice. He acknowledged that he was standing at the rear of the car with Officer Mannin but that he had heard that part of the conversation as he was getting out of the car.

Trooper Den Houten on the other hand, testified that he didn't recall asking about beer. He testified that he told Mrs. Brandys about an assault in Illinois; that he told her what had happened in Illinois and asked if the automobile could be taken to the police post for a further search. Mrs. Brandys replied that he could, but she inquired how she could get to her mother's home. Trooper Den Houten told her that he and Officer Mannin would drive her there. Officer Mannin also testified that Mrs. Brandys stated that they could search the car, that she wanted to cooperate one hundred per cent. The trooper then asked Mr. Koth to drive the car to the Post. Koth drove the Brandys' car to the Police Post, parked the car on the parking lot, locked the car and gave Trooper Den Houten the keys.

The officers testified that it took most of the morning of August 5, 1971 to obtain a search warrant to search the vehicle. The car was not entered while it was parked on the police post parking lot until the search warrant was obtained and brought to the post. During the search the officers removed the rear seat which was brought to Illinois by Officer Mannin for the purpose of checking the spots thereon. The search at the Post also revealed some hairs which the officers had not seen prior to the search.

Mrs. Brandys testified that she either called or visited the post every day for a week attempting to get the vehicle back. The officers testified that Mrs. Brandys appeared at the post two or three times while they were searching the vehicle on the 5th of August.

Officer Mannin testified that just prior to or during the search Mrs. Brandys appeared at the post parking lot and requested to talk to the parents of the young girls. Trooper Den Houten testified that while they were searching the vehicle Mrs. Brandys came over and said that Jim (her husband) had in fact changed the bucket seats after the week-end they were down in Illinois. Officer Mannin testified that while Mrs. Brandys was talking to the parents of the girls he asked her if she wanted a copy of the search warrant and she said that after they finished the search they could leave it in the car. That "that would be fine."

Officer Mannin also testified that upon completion of the search of the automobile on the 5th of August, he walked over to Mrs. Brandys who was still talking to the parents and that at that time Mrs. Brandys seemed convinced that her husband was involved in something or other. She was curious as to what the spots were and how they got there. Officer Mannin testified that he then asked if Mrs. Brandys wanted copies of the search warrant affidavit or whether they should be left in the car, and she stated that they could be left in the car.

Both officers testified that Mrs. Brandys never objected to the search of the automobile at any time.

The rear seat of the vehicle was removed during the search and it, together with some hairs obtained by vacuuming the vehicle, was brought to Illinois by Officer Mannin. Officer Mannin testified that he started back to Illinois between ten o'clock A.M. and noon on August 6, 1971.

Trooper Den Houten testified that Mrs. Brandys came to the Post on August 6th to pick up the automobile. At that time the Trooper told Mrs. Brandys that a copy of the search warrant was in the car and he went out and got it and gave it to her. He stated that he also had Mrs. Brandys sign a receipt for the

vehicle when she obtained it on August 6th and the receipt, People's Exhibit 1, is dated August 6th.

Despite Mrs. Brandys' testimony that the officers retained possession of the automobile for a week, the evidence indicates that the vehicle was driven to the Police Post on August 4, searched on the afternoon of August 5 and picked up by Mrs. Brandys on August 6, 1971.

Trooper Den Houten testified that he did not see Officer Mannin after August 5, 1971 until the hearing upon these motions.

As to the motion of defendant DeMorrow to exclude from evidence certain items of clothing obtained in a search of his residence on August 4, 1971, the facts, as summarized, are as follows:

On August 4, 1971 Trooper Den Houten and Officer Mannin went to the residence of the defendant DeMorrow to affect his arrest as a suspect in the Illinois incident. Trooper Den Houten knocked at the front door and one Alice Cook, who apparently lived in the house and is now the wife of the defendant DeMorrow, answered the door. Trooper Den Houton asked if defendant DeMorrow, was there and Miss Cook stated that he was not. Trooper Den Houten then started away from the front door when Officer Mannin told him that a window on the side of the house which had not been open when they arrived was now open. The officers went back to the front door and Miss Cook then said that the defendant had probably already left and that they could come into the house and search for the defendant. Trooper Den Houten then went through the house and made a cursory examination of the rooms and did not see the defendant. The trooper testified that he thought the defendant had left through the window and was at large in the area and he made a call for assistance from his car. Miss Cook came

out of the house and got into an automobile parked nearby and Trooper Den Houten asked her if she would be so good as to stay and not leave since he thought she would leave and pick up the defendant DeMorrow.

Trooper Den Houton went back into the house and saw the defendant sitting on a bed in a room adjacent to the living room. The trooper advised the defendant of his rights according to the Miranda warnings and called for Officer Mannin who was outside. Officer Mannin came in and advised defendant of his rights in Trooper Den Houten's presence.

The testimony of Defendant DeMorrow with respect to the circumstances surrounding his arrest was that when the officers came in he asked if it was on this charge in Illinois. The officers asked if he knew about it and the defendant said that he knew a little about it. The defendant testified that the officers then placed him under arrest and gave him his constitutional rights.

Officer Mannin testified that he then asked the defendant if he had been down in Illinois over the weekend. The defendant said he had. The officer asked who he was with and asked if he could see some of the clothing he had worn over the weekend or something of that nature. The defendant said he was wearing a yellow shirt on the weekend but couldn't remember which one– or a white shirt. The officer asked if he would voluntarily get the shirt and he said, "yes, he would." The defendant went to the clothes hamper and gave them to the officer, a button type and one pullover type. The officer asked if he also had a blue type vest or anything of that nature and the defendant said he didn't have one in the house and didn't own one of that nature. The officer asked if he could look the house over for something of this nature and the defendant said go ahead and search and Miss Cook said go ahead and search. The officer went into the bedroom where defendant's clothes were hanging and found a blue denim vest and took it back into the room

and asked the defendant if he had ever seen the vest before and the defendant said it wasn't his but that it belonged to Miss Cook.

Trooper Den Houten's testimony about officer Mannin obtaining the shirts is unclear. On direct examination he stated that Officer Mannin asked the defendant if he had any yellow shirts or anything to that effect and the defendant said, "Yes, I have a yellow shirt." That Officer Mannin then said, "Where is it? and the defendant said, "In here." and started to walk over and he found it in a bunch of dirty clothes. On cross examination, Trooper Den Houten was asked if the defendant brought out any articles and the trooper answered that the defendant started to and Detective Mannin headed for the bedroom and Detective Mannin asked the defendant "Here?" and defendant DeMorrow said, "yes". Trooper Den Houten was then asked, "He never gave you any consent?" to which the trooper answered that the defendant did. The trooper said defendant said, "Just go ahead, I have nothing to hide."

Again, on later cross examination, Trooper Den Houten was asked if the defendant offered to find some clothes for him and the trooper said he was headed that way. Defense counsel then requested the trooper to answer the question; "Did he make such an offer?" and the trooper answered, "yes".

Defendant DeMorrow's testimony pertaining to the officers taking the two shirts and vest was simply a denial that either he or anyone else gave the officers permission to search for the clothing, without amplification as to whether there were any conversations with respect to the taking of the articles by the officers. The defendant did testify that the vest taken by the officers was the property of Miss Cook.

From the foregoing findings of facts the Court makes the following conclusions of law:

The motions of the defendants to suppress do not allege, nor does the evidence offered by the defendants (Defendants' Exhibit 1– Affidavit and Complaint for Search Warrant and Defendants' Exhibit 2– Search Warrant and Tabulation and Return of Search Warrant) suggest that the search and seizure of property from the automobile of Defendant Brandys at the Police Post was conducted without a valid search warrant and it must, therefore, be assumed that the search and seizure was valid and that the exclusionary rule under the Fourth Amendment of the Constitution of the United States has not been invoked as a result of the actions of the police officials on that particular occasion.

Mapp v. Ohio, 367 U.S. 643 (1961)

In reading the motions, the Court understands the contentions of the defendants to be, (1) that the observations of the interior of the Brandys automobile by the police officers while it was parked at the residence of the owner was an unreasonable search under the Fourth Amendment, and (2) that the driving of the Brandys automobile from the place where it was stopped on a public highway to the parking lot of the Police Post at the request of a police officer was illegal conduct on the part of the policeman which is prohibited by the Unites States Constitution, and that this conduct is grounds for excluding the property seized by warrant from the automobile at the Police Post under the "fruit of the poisonous tree doctrine."

Alderman v. United States, 394 U.S. 165 (1969)
Nardone v. United States, 308 U.S. 338 (1939)

As to the first contention, the observation of two spots on the rear seat of the automobile by the police officers who had probable cause that the automobile in question had been used in the commission of prior felonious offenses three days earlier in another state; who were upon the premises in the course of

an investigation of the crimes, and who were talking to the defendant's wife and his father in the vicinity of the automobile about the whereabouts of the defendant and the presence of bucket seats in the automobile on the day of the alleged offenses, was a plain view observation by officers who had a right to be in the position they were in.

Harris v. United States, 390 U.S. 234 (1968)
Robbins v. MacKenzie, 364F2d 45 (C.A. 1st-Me-1966)
Commonwealth v. Campbell, 352 Mass. 387 (1967)
Smith v. Commonwealth, 424 S.W. 2d 835 (Ky-1968)

Assuming arguendo, that the observations by the police officers of the Brandys automobile at his residence was a search, the right of privacy of the defendant Brandys was not violated since the search was not unreasonable.

Preston v. United States, 376 U.S. 364 (1964)
People v. Jones, 38 Ill. 2d 427 (1967)
People v. Brown, 38 Ill. 2d 353 (1967)

The test is always the reasonableness of the search under the circumstances.

Cooper v. California, 386 U.S. 58 (1967)

The State's Attorney has cited a Court of Appeals case arising out of the Seventh Circuit in which the police, after learning from the victims the identity of an automobile involved in a crime of rape where the rape took place in the automobile, looked into the window of the automobile at defendant's home and saw blood on the seat; arrested the defendant at his home, took him to the station and later towed the car away and searched it without a warrant. The Court held that the automobile itself was the scene of the crime of the rape and therefore could be searched by the police.

Weaver v. Lane 382 F2d 251 (1967)

As to the second contention, Betty Brandys, the wife of the defendant James Brandys, was rightfully in possession of the defendant's automobile and the more credible testimony indicates that she voluntarily consented to the automobile being driven by her friend, Mr. Koth, to the police post, thus defendant's claim of privilege under the Fourth Amendment against seizure of his automobile was waived by his spouse.

Gurleski v. U.S. 405 F2d 253 (C.A. 8th, Tex (1968)
U.S. v. Alloway 397 F2d 105 (C.A. 6th, Tenn–1968)

Assuming as to the second contention, arguendo, that the consent was not voluntarily given by the wife to move the automobile to the police post, the "seizure" of the automobile for the purpose of taking it to a place where it could be later searched with a warrant was not an unreasonable seizure under the circumstances which was protected by the Fourth Amendment.

Cooper v. California, Supra
Preston v. United States, 376 U.S. 364 (1964)

Where an automobile has been the instrumentality of a crime, it may be seized if this is accomplished while the automobile is on the "highway" or if it is occupied when stopped, provided that a warrant is obtained in order to search the automobile in a thorough manner.

Coolidge v. New Hampshire 403 U.S. 15 (1971)

Assuming also, arguendo, that the evidence was wrongfully obtained from the Brandys automobile by means of an illegal search and seizure, the defendant Gerald DeMorrow does not have the necessary standing to object under the Fourth Amendment.

Alderman v. United States 394 U.S. 165 (1969)
Simmons v. United States 390 U.S. (1968)

As to the contention of the defendant DeMorrow that certain items of clothing were obtained by the police officers as a result of an illegal search and seizure, the more credible testimony indicates that the defendant voluntarily consented to the search and seizure of the clothing, hereby waiving his constitutional right to object that the search and resultant seizure were unlawful.

Katz v. United States 389 U.S. 347 (1967)
Zap v. United States 328 U.S. 624 (1946)

The denial of defendant DeMorrow that he gave his consent to the search is negated by testimony that he in fact cooperated with the officers in conducting a portion of it.

U.S. v. Torres 354 F2d 633 (C.A. 7th, Ill–1966)

The court holds that the rights of the defendants under the Fourth Amendment were not violated by the search and seizure of property from the Brandys automobile, nor were the rights of the defendant DeMorrow under the Fourth Amendment violated by the search of his home and the seizure of certain items of clothing; accordingly, the motions of the derendants and each of them to Suppress Evidence are hereby defied.

Dated this 8th day of March, 1972

Paul M. Wright

APPENDIX B

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT I. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 29th day of November A.D. 1973, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12070

Agenda 73-131

THE PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
JAMES BRANDYS,)
Defendant-Appellant) Appeal from
and) Circuit Court
Gerald DeMorrow,) Vermilion County
Defendant.)

Mr. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

Defendant was found guilty in a jury trial on the charges of aggravated kidnapping and unlawful restraint of a twelve-year-old female. Judgment of conviction was entered for each offense. Defendant was sentenced only for aggravated kidnapping to an indeterminate term of 10 to 25 years. Defendant appeals.

Defendant contends that the trial court erred in refusing to suppress evidence obtained from the search of his automobile; that he was not proven guilty beyond a reasonable doubt; and that the sentence imposed was excessive. In light of the first two averred errors, defendant requests his conviction be reversed outright, or, in the alternative, be reversed and remanded for a new trial.

The facts are as follows. At 8:00 p.m. on August 1, 1971, Cindy Jean Drollinger was forced into an automobile by defendants, James Brandys and Gerald DeMorrow. The defendants drove the victim out into the country and sexually assaulted her. The abduction took place in front of the victim's home in Hoopeston, Illinois. Jackie Morse, who was with Cindy Jean when the abduction occurred, notified Cindy's father of the incident. Mr. Drollinger reported the incident to the authorities.

At approximately 9:15 p.m., defendant's automobile was stopped in Milford, Illinois by the police. The defendants answered routine questions and explained that they were from out of state and that they were lost. Shortly after defendants were stopped, Mr. Drollinger and Mr. Jerry Yonkers, who were out searching for Cindy Jean, drove up and parked behind defendant's car. Drollinger conversed with the defendants, asking them whether either of them had seen his daughter. Drollinger and Yonkers noticed a large damp spot in the middle

of the back seat of the automobile. Drollinger requested Brandys to open the trunk of his car, which he did, but the trunk was empty. The policeman checked on the origin of the automobile and determined that it was not stolen. He then permitted the defendants to leave because he felt there was no reason for detaining them further. Cindy Jean was eventually returned to her parents around 11:30 p.m. that evening, whereupon she was taken to the hospital and examined.

On August 4, 1971, officer Mannin of the Hoopeston police department, Cindy Jean Drollinger, Jackie Morse, and their parents, went to defendant's residence in Three Oaks, Michigan. The purpose of the trip was to determine whether Cindy Jean and Jackie could identify defendant as one of the assailants and his automobile as the vehicle involved in the abduction. The two girls were able to positively identify defendant's car.

Both defendants were indicted on September 10, 1971. The counts relative to this case were Counts I and IV, which charged defendants with aggravated kidnapping and unlawful restraint, respectively. The defendants, Brandys and DeMorrow, pleaded not guilty to all charges. On February 29, 1972, the defendants filed a motion to suppress evidence. The motion submitted that defendant Brandys' automobile was subjected to a warrantless search and seizure. The defendants requested that all evidence resulting from the search and seizure be suppressed.

At the hearing on the motion, six witnesses testified. Brandys' wife, Mrs. Betty Brandys, stated that around 11:00 a.m. on August 4, 1971, a policeman knocked on her door and asked to see Mr. Brandys. She informed the officer that her husband was not at home. She testified that her husband's automobile was parked in their private driveway, and that the police officer from Illinois had approached the car and opened the back door and looked around; that he walked to the driver's side, opened the front door and looked around again. The same

officer asked her how long the bucket seats located in the front of the car had been there. According to Mrs. Brandys, the officer presented no search or arrest warrants. She further stated that since these events had upset her and the fact that she was five months pregnant at that time, Mrs. Brandys decided to go to her mother's home. Mr. Jerry Koth, a neighbor, agreed to drive her in defendant's car. En route a state trooper stopped the automobile. The trooper informed Mrs. Brandys that he was detaining them in order to determine whether the automobile contained opened alcoholic beverages. Mrs. Brandys testified that she informed the officer that none was in the car, but the trooper informed her he wanted to impound the automobile so that it could be searched. She said, "Do I have any choice?" And, according to her, the officer replied, "No, you don't." Mr. Koth was then directed to proceed to the State Police Post where the automobile was impounded. She stated that she was present four or five days later when the car was searched. The authorities returned the car to her a week later with the back seat of the car missing.

Mr. Koth took the stand on behalf of defendant. He corroborated the testimony of Mrs. Brandys concerning the events that transpired on the public highway.

Officer Mannin testified that he and trooper DenHouten, Mr. James Drollinger, Mr. Morse, Cindy Drollinger and Jackie Morse, went to the home of Mr. and Mrs. James Brandys on August 4, 1971. Both Cindy and Jackie observed the defendant's car from a public street; and that they positively identified the car as the vehicle used in the kidnapping. He stated that he looked through the car window while on defendant's premises and saw two large spots located on the rear seat; but that he did not open any door of the automobile while it was parked in the driveway; and no one present opened any of these doors. He also noticed that the front seats of the car had been changed from bench seats to bucket seats from the time it was first observed by Mr.

Drollinger on the roadside outside of Milford, Illinois. In his conversation with Mrs. Brandys, he informed her that Mr. Brandys was a suspect in the case under investigation and that he wanted to talk to him. Once informed that defendant was not at home, he stated he left and returned to the State Police Post.

Mannin averred that he and trooper DenHouten eventually decided to return to the Brandys' residence in order to see if defendant had returned. En route they saw defendant's automobile being driven on the public highway. They stopped the vehicle to ask Mrs. Brandys if the car could be impounded until a search warrant could be secured. Mannin noted that when Mrs. Brandys was asked if she would consent to the impoundment of the vehicle, she was cooperative and did not inquire as to whether she had any choice in the matter. Mannin further stated that pursuant to a search warrant, the car was searched on August 5, 1971, and that the back seat of the automobile was seized along with various hair fragments and other materials found in its carpet.

Trooper DenHouten corroborated the testimony of officer Mannin. With reference to the seizure on the highway, he denied telling Mrs. Brandys that the vehicle was being detained to determine whether alcohol was present therein. He also stated he did not coerce her to agree to the impoundment.

Mr. Drollinger substantiated the testimony of the two officers. However, in rebuttal, Mr. Andrew Brandys, the defendant's father, said that he saw one of the police officers open the car door, look under the front seat and lean into the back seat from the front door. He stated that the officers asked him about the bucket seats that were in the front of the car and he replied that as far as he knew they had always been in the car.

At the conclusion of the testimony, the court denied defen-

dant's motion to suppress the evidence. The court found that the police officers had not opened the door of defendant's automobile or entered it at anytime while on defendant's private property; and that the observations of the interior of defendant's automobile were made in plain view, therefore did not constitute a search.

After a jury trial, Brandys was found guilty on Counts I and IV. He filed a post trial motion contending that the evidence was insufficient to establish his identity beyond a reasonable doubt and that the offense of kidnapping was not established due to a failure to prove confinement. The motion was denied. Defendant then submitted a motion for probation which was also denied. After a hearing in aggravation and mitigation, Brandys was sentenced to an indeterminate term of 10 to 25 years for the offense of aggravated kidnapping.

Defendant first contends that the observations made of the interior of his automobile by the authorities while it was located on his premises was a warrantless search proscribed by the fourth amendment. Defendant submits that **Coolidge v. New Hampshire**, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, is dispositive.

The facts of **Coolidge** are distinguishable from this case. In **Coolidge**, defendant's home and automobile were under surveillance for several days. The police knew of the exact location of the automobile and planned all along to seize it. When defendant was arrested, his automobile was also seized and taken to the police station whereupon it was searched. The Supreme Court held that the fruits of the warrantless search and seizure were improperly admitted at the trial. In discussing the state's argument that the plain view exception justified the seizure of defendant's automobile, the court noted that the plain view doctrine cannot be used to overcome the duty of securing a warrant, expecially where the discovery of items seized is antic-

ipated and the necessity of securing said warrant is not obviated because exigent circumstances were not present. (403 U.S. 443, 470.)

In the case at bar, the authorities were engaged in a routine investigation. Defendant's automobile had positively been identified as the vehicle used in the aggravated kidnapping. Police went to defendant's home in order to question him concerning his possible connection with the crime. While on defendant's property, the authorities observed the interior of the automobile that was in plain view. The trial court found that when the police made the observations in question, defendant's automobile was not opened and the authorities were on defendant's premises in the course of a lawfully conducted investigation. Therefore, the court concluded that these observations did not invade defendant's zone of privacy protected by the fourth amendment. **People v. Nunn**, 7 Ill.App.3d 601, 288 N.E.2d 88.

These findings were based on the testimony of the witnesses that appeared at the hearing on defendant's motion to suppress. Accordingly, we are confronted with an issue of credibility of these witnesses, and a reviewing court must accept the findings of a trial court on questions of credibility unless they are unreasonable. (**People v. Holloman**, 46 Ill.2d 311,317,263 N.E. 2d 7.) We are bound to accept the testimony given by the state's witnesses as true since it is not unreasonable. Assuming the truthfulness of the testimony of the police officers, we must concur in the conclusions of the trial court that the officers made the contested observations in plain view. The Supreme Court has held that an officer who has the right to be where he is and observes an object in an automobile in plain view, that observation is not a search and thus does not fall within the proscription of unreasonable search and seizure. **Coolidge v. New Hampshire.**

Defendant next contends that the consent given by his wife

to the authorities permitting them to impound his automobile was involuntary; therefore all fruits of that seizure should be suppressed. We cannot agree.

In the hearing on defendant's motion to suppress, the trial court found that defendant's wife had voluntarily consented to the seizure. The record reveals that in its findings the trial court complied with the test laid down in **Schneckloth v. Bustamonte**, U.S. , 93 S.Ct. 2041, 36 L.Ed.2d 854. In **Schneckloth**, the court held:

> " * * * (T)hat when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. **Voluntariness is a question of fact to be determined from all the circumstances**, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. * * * " (Emphasis added.) (36 L.Ed.2d 854, 875.)

Notwithstanding Mrs. Brandys' voluntary consent concerning the impoundment of defendant's automobile, we find that exigent circumstances existed which permitted the seizure of said vehicle without a warrant.

In **Chambers v. Moroney**, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, it was stated that an automobile can be searched without a warrant under circumstances which would not justify the warrantless search of a home or office, provided there was proable cause to believe the automobile contained articles that were entitled to be seized. The circumstances which furnish probable cause to search a particular automobile are most often unforeseen and the opportunity to search is fleeting due to the mobility of the vehicle.

Mannin and DenHouten observed the defendant's vehicle traveling on a public highway as they were en route to defendant's home. The trooper recognized the woman in the vehicle to be Mrs. Brandys and believed that the man driving was defendant. Moreover, the authorities knew that the interior of the car had recently been altered and were fearful that the back seat would ultimately be removed if the car was not impounded. All of these facts constituted exigent circumstances that would permit the summary seizure of defendant's automobile. **People v. Peter,** 42991, Ill.S.Ct., September Term (1973).

As to defendant's next contention that the evidence does not establish his guilt beyond a reasonable doubt, we cannot agree. The State must prove a defendant's guilt beyond a reasonable doubt, however, the positive testimony of just one credible witness is enough to convict a defendant. (**People v. Novotny,** 41 Ill.2d 401, 244 N.E.2d 182.) Defendant was positively identified as the assailant of Cindy Drollinger. His vehicle was also identified as the one involved in the abduction. The fact his testimony conflicted with that of the State's witnesses created a question of credibility for the jury. It is clear from the verdict that the jury chose to resolve this conflict in favor of the State. This court cannot substitute its judgment for that of a jury on issues of credibility unless proof was so unsatisfactory as to warrant a reasonable doubt of guilt. **People v. Johnson,** 75 Ill.App.2d 42, 221 N.E.2d 59.

Lastly, defendant asserts that the sentence of 10 to 25 years for aggravated kidnapping other than for ransom was excessive. Under Illinois Revised Statutes (1972 Supp.), chapter 38, paragraph 10-2(d) (2), aggravated kidnapping is a Class I felony. The maximum term of incarceration for a Class I felony is any term in excess of 4 years (Ill.Rev.Stat.(1972 Supp.), ch. 38, par. 1005-8-1(d) (2)). The minimum is 4 years "unless the court, having regard to the nature and circumstances of the offense, history and character of the defendant, sets a higher minimum

term". (Ill.Rev.Stat., ch. 38, par. 1005-8-1(c) (2).)

We find that the sentence imposed in this case is not excessive. Defendant was convicted of aggravated kidnapping of a twelve-year-old female. At trial, the evidence was established that the victim was physically brutalized. It was brought out at the hearing in aggravation and mitigation that the defendant had a criminal record and had been involved in at least one other other crime of violence. His past record and the nature and circumstances surrounding the commission of the crime for which he stands convicted indicates defendant falls within the provisions of chapter 38, paragraph 1005-8-1(c) (2), that permits the exacting of a minimum sentence greater than the 4 years prescribed therein.

The judgment of the circuit court of Vermilion County is affirmed.

AFFIRMED.
SMITH, SIMKINS, JJ., concur.

UNITED STATES OF AMERICA

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH JUDICIAL DISTRICT } ss.

At an APPELLATE COURT sitting at Springfield, within and for the State of Illinois.

Present: Honorable JAMES C. CRAVEN, Presiding Judge
Honorable SAMUEL O. SMITH, Judge Honorable LELAND SIMKINS, Judge
Hugh A. Campbell, Sheriff

Attest: Robert L. Conn, Clerk

BE IT REMEMBERED, that to-wit: On the 29th day of November A.D. 1973, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

People of the State of Illinois, Plaintiff-Appellee	Appeal from Circuit Court of
vs.	
No. 12070	Vermilion County
James Brandys, Defendant-Appellant and	
Gerald DeMorrow, Defendant	Circuit Court No. 71-CF-155

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgement aforesaid, is there anything erroneous, vicious, or defective, and that in that record there is no error:

THEREFORE, it is considered by the Court that the judgement aforesaid be AFFIRMED in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

I, Robert L. Conn, Clerk of the said Appellate Court, do hereby certify that the foregoing is a true copy of the final order of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Appellate Court, at Springfield, this 23rd day of April, in the year of our Lord one thousand nine hundred and seventy-four

(s) Robert L. Conn
Clerk of Appellate Court,
Fourth Judicial District of Illinois.

46455

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

JUSTIN TAFT
CLERK

TELEPHONE
AREA CODE 217
525-2933

March 28, 1974

Mr. Eugene B. Culberson
Attorney at Law
106 N. Vermilion – Suite 313-315
Danville, Illinois 61832

No. 46455 – People State of Illinois, respondent, vs. James Brandys, petitioner. Leave to appeal, Appellate Court, Fourth District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

(s) Justin Taft
Clerk of the Supreme Court

United States of America

State of Illinois
Supreme Court *ss.*

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the

United States of America

State of Illinois
Supreme Court *ss.*

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of March in the year of our Lord, one thousand nine hundred and seventy-four , within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice
Justice Walter V. Schaefer Justice Thomas E. Kluczynski
Justice Daniel P. Ward Justice Charles H. Davis
Justice Joseph H. Goldenhersh Justice Howard C. Ryan
William J. Scott, Attorney General
William G. Lyons, Marshall
Attest: Justin Taft, Clerk

Be It Remembered, that, to-wit: on the 28th day of March 1974, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

People State of Illinois,
Respondent

No. 46455 vs.

James Brandys and
Gerald DeMorrow

James Brandys,
Petitioner

Petition for Leave to Appeal from

Appellate Court
Fourth District
12070
71 – CF – 155

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 19th day of June , 1974.

(s) Justin Taft Clerk,
Supreme Court of the State of Illinois.